Office-Supreme Court, U.S.
FILED
APR 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. 1071

BOB G. SHUPE,

Petitioner,

VS.

NEW YORK CENTRAL SYSTEM,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOSEPH BARBERA,
One N. LaSalle Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

JOHN J. MILANO,
DOM J. RIZZI,
A. J. HARDIMAN,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented For Review	2
Statement of the Case	3
Evidence pertaining to the accident	3
Evidence pertaining to plaintiff's injuries	4
Evidence pertaining to the "second accident" of June 21, 1963	6
Reasons for Granting the Writ	8
Conclusion	17
Appendix	19

List of Authorities

Cases:

Davis v. Baltimore & Ohio R. Co., ... U.S. ....., 13 L. Ed (2) 594	9
Ellis v. Union Pacific R. Co., 329 U.S. 649	8
Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108	9
Lavender v. Kurn, 327 U.S. 645, 652	8
Mesarosh v. United States, 352 U.S. 1	15
Rogers v. Missouri Pacific R. Co., 352 U.S. 500	9
Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29	8
United States v. Shotwell, 335 U.S. 234, 240	15
Webb v. Illinois C. RR. Co., 352 U.S. 512	9
Wilkerson v. McCarthy, 336 U.S. 53	9

Articles:

69 Harvard Law Review 1441	9

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No.

BOB G. SHUPE,

Petitioner,

VS.

NEW YORK CENTRAL SYSTEM,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

Petitioner Bob G. Shupe prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above cause.

OPINION BELOW.

The opinion of the court below is reported in 339 Fed. 2d 998 and appears as an Appendix in this petition. The decision of the United States Court of Appeals was entered on January 4, 1965, and a petition for rehearing was denied on February 2, 1965.

JURISDICTION.

This is a negligence action brought under the Federal Employer's Liability Act, 45 U.S.C. Sections 51 et seq. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I.

Can a Court of Appeals overrule decisions of the Supreme Court?

II.

Can a Court of Appeals, under the guise of reversing and remanding for a new trial, enter, for all practical purposes, a judgment for defendant notwithstanding plaintiff's verdict?

STATEMENT OF THE CASE.

a) Evidence Pertaining to the Accident.

On December 19, 1962, plaintiff petitioner, who worked as a janitor in defendant's two story building, was carrying on his left shoulder a 100 pound carton of office supplies through a door controlled by an automatic closing device. (A. 31, 43, 44) For 15 or 20 weeks prior to the occurrence this closing device had been defective, causing the door to slam shut with a heavy and hard force. During this period plaintiff had reported this defective condition 4 or 5 times to his superiors. The condition was not repaired. (A. 49-50) The door slammed so hard during that period that it cracked the plaster along the framework of the door. (A. 50-51, Addt'l. A. 14—Plf's. Ex. 11) Joseph Walsh, defendant's witness, admitted that the plaster crack near the door frame could have been caused by the door slamming hard in closing. (A. 248) Mr. Walsh also admitted to prior complaints by employees of doors slamming hard because of defective door closing mechanism. In such cases emergency repairs would be made until someone from the Building Department got there. (A. 244-45) On the morning of the occurrence plaintiff opened the door with his right hand, kicked the door back with his left foot in order to get through. He didn't move fast enough and the slamming door struck the box with such force that he felt a sharp, tearing-like pain in his left shoulder. (A. 43, 45) He put the carton on the floor because of shoulder pain, rubbed his arm a few seconds and tried to pick up the carton. He lifted it up a few inches but had to drop it back on the floor because of shoulder pain. (A. 48) The accident was then reported immediately, an accident report was filled out and plaintiff was taken to one of defendant's doctors for treatment of his injured shoulder.

b) Evidence Pertaining to Plaintiff's Injuries.

Plaintiff remained under the continuous care of defendant's doctors from the occurrence date through May 17, 1962. During that period he was hospitalized three times (January 31, 1962, to February 12, 1962; March 4, 1962, to March 24, 1962, and May 9, 1962, to May 17, 1962.) The opinion of defendant's Dr. Hamilton was that plaintiff "probably suffered an injury to the supra-spinatous muscle." (A. 267) During the time he was under defendant's medical care, he was given heat treatments, physical therapy treatments, given pain medications daily, had his left arm manipulated while under a general anesthetic in order to break loose adhesions (A. 277-278), had his arm placed in a body cast for 16 days (Additional A. 8, A. 77) and was examined by Dr. James Vanderbosch a psychiatrist selected by defendant. (A. 79, 204) As a result of all this medical attention plaintiff had a "frozen" or a stiff shoulder when he left the hospital in May 1962. (A. 346) Defendant's psychiatrist concluded that as a result of his injury plaintiff was suffering from a "conversion reaction" which he defined as "a psychological reaction or a neurotic reaction in which the anxiety, which is the basis for all neuroses, is expressed on the muscular or skeletal system or the special sensory organs." (A. 205) The psychiatrist considered this a disease over which the victim has no control. (A. 216-217) Defendant's Dr. Hamilton admitted that plaintiff did not respond to these extensive treatments because "actually he had a stiff shoulder when he left the hospital." (A. 346)

Following defendant's medical treatments, plaintiff saw his family doctor, was hospitalized from May 24, 1962, to June 6, 1962, and submitted to an operation at Presbyterian-St. Luke's Hospital by Dr. Charles V. Heck an ortho-

pedic surgeon. (A. 135-136) This doctor found that the cartilage surface covering the end of the collar bone was destroyed. He removed 5/8th of an inch of the distal end of the collar bone, removed a portion of the ligaments holding the shoulder joint and also a portion of the joint lining from the shoulder blade. (A. 137-138) This doctor testified that he got a poor result from the operation, that plaintiff had extensive limitations of motion of the arm in all directions, that the condition was permanent and that further treatment would be of no help to plaintiff. (A. 144, 145, 153, 156-157) He was discharged from the hospital on June 15, 1962. The excised section of the clavicle was examined microscopically by Dr. George Haas the hospital pathologist. In his opinion the destruction found in the cartilage was "most in keeping with a post-traumatic lesion." (A. 75) In answer to a hypothetical question he testified that there was a causal connection between the shoulder injury of December 19, 1961, and the destructive lesion found in his examination. (A. 174)

On August 21, 1962, defendant's Dr. Hamilton permitted plaintiff to return to limited work because he "felt it would be both physically and emotionally good for him to be occupied, and on that basis I recommended that he go back to his duties, most of the duties of his regular occupation." (A. 296) Following his return to work Dr. Hamilton testified that plaintiff's arm got worse. (A. 297) Plaintiff worked on light duty from August 21, 1962, to June 21, 1963. He couldn't do any lifting with his left arm. The extent of his work was to keep the office desks and dining room tables wiped off. He tried to do whatever he could handle with what movement he had in his left arm. (A. 84)

c) Evidence Pertaining to the "Second Accident" of June 21, 1963.

On June 21, 1963, the general foreman sent word to plaintiff through an assistant that he wanted the office windows washed. (A. 97) Although this work required the use of a stepladder plaintiff knew he "wasn't in a position to refuse the job." (A. 97) On this point plaintiff further testified that "due to the fact that I couldn't use that one arm on the stepladder he knowed not to put me there. It's a violation of all rules. It's a danger to a man's life when he's already injured." (A. 97-98) In describing this accident plaintiff testified that he "got the stepladder and climbed to the top of it and got most of the windows down. I started to turn back off and fell off the ladder into the wash basin, *due to the fact that I couldn't use my left arm.* (A. 97) * * * I couldn't get hold of nothing. *Left hand, I couldn't get it out to hold anything.*" (A. 181)

Plaintiff injured his back as a result of the fall. (A. 98) He wore a lumbosacral corset for this injury. (Additional A. 1) On July 29, 1963, and on August 9, 1963, plaintiff was given back to work examinations by defendant's Dr. Davia. His written report to defendant included the following: Objective findings: Wearing lumbosacral corset with stays. *Motion almost completely restricted of left arm at shoulder.* Tenderness and surgical scar over left aromioclavicular joint. Had distal end of clavicle removed. Recovery Date: * * * Probably may never be able to return because of emotional problems * * * *May be able to do light sedentary work where use of the left arm is not required anytime.* (Additional A. 1-2) As a result of these findings defendant discharged plaintiff on August 21, 1963, because the examinations of Dr. Davia "resulted in his recommendation that you are disqualified as physically unfit to work." (A. 89)

Plaintiff charged defendant with negligence under the Federal Employer's Liability Act for:

(1) Failing to furnish plaintiff a reasonably safe place in which to do his work.

(2) Allowing the door in question to be worn, defective and out of repair.

(3) Failing to repair the door after it knew or in the exercise of ordinary care should have known of its defective condition.

The jury found in favor of petitioner and awarded him a verdict of One Hundred and Twenty Five Thousand ($125,000.00) Dollars.

The Appeals Court reversed and remanded because the jury verdict was "arbitrary and capricious," because of the "gross excessiveness of the verdict, combined with close or doubtful liability," and because this was an "exceptional" case.

REASONS FOR GRANTING THE WRIT.

I.

The Appeals Court, by its decision, overrules a long line of opinions by this Honorable Court holding that "*it would be an undue invasion of the jury's historic function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at conclusions opposite from the one reached by the jury.*" *Lavender* v *Kurn*, 327 U.S. 645, 652.

In that case this Court further said at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference."

In *Tenant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, this Court held at page 35:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable."

In *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, this Court held at page 653:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The "mood" of this Honorable Court is to insulate the factual findings of a jury from reappraisal of the evidence by an Appeals Court. 69 Harvard Law Review 1441. This mood was succinctly expressed by Mr. Justice Douglas in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53. At pages 70-71 Mr. Justice Douglas said:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.
>
> "The historic role of the jury in performing that function (citing cases) is being restored in this important class of cases."

This view denying an invasion by Courts of Appeals into the function and province of the jury as judges of the facts has been reiterated in *Davis* v. *Baltimore & Ohio R. Co.*, ... U.S. ..... 13 L. Ed (2) 594; *Webb* v. *Illinois C. RR. Co.*, 352 U.S. 512; *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500; *Gallich* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108.

The Opinion in the case at bar completely ignores these pronouncements by this Court. No error of law forms the basis for reversal. The Opinion undertakes a reappraisal and re-evaluation of the evidence different from that made by the jury who saw and heard the witnesses. Aside from the many erroneous factual conclusions made in the Opinion, one cannot escape the impression that the Opinion reads like the brief of an ardent advocate for defendant. It fails to ascend notable heights of fairness or judicial impartiality.

The reasons for reversal were:

(1) "• • • the fact that plaintiff worked continuously for 10 months after his shoulder injury and

immediately prior to his back injury, we hold that no reasonable jury would find that plaintiff's disability from work was solely attributable to his shoulder injury." (Opinion P. 4)

(2) The amount of damages awarded was "grossly excessive." (Opinion P. 5)

(3) The verdict of the jury was "arbitrary and capricious" because "plaintiff's claim at trial that he was injured by a defective door closer is so grossly at variance with that of numerous persons with whom he came in contact after the alleged accident." (Opinion Pages 8-9)

(4) This is "one of those exceptional cases which call for a reversal." (Opinion P. 9)

Comments on Reason No. 1 for Reversal:

This statement assumes that plaintiff carried on all of his regular duties during that 10 month period. It completely ignores plaintiff's testimony that during that 10 months he did only light work and could not do any lifting with his left arm (A. 84) It completely ignores the testimony of defendant's Dr. Hamilton who admitted that during that 10 month period plaintiff's left arm got worse. (A. 297) And it completely ignores the plain language in the report of defendant's Dr. Davia who attributed plaintiff's unemployability to a) emotional problems, b) may be able to do light sedentary work where use of left arm is not fully required. (Additional A. 1-2)

The Opinion accepts defendant's contention (1) that there is no evidence that the second accident was caused, in whole or in part, from the first and that (2) as a matter of law defendant is not liable to plaintiff for loss of future wages because it was the second accident that rendered

plaintiff no longer employable as a janitor. (Opinion, P. 3) The reverse is true. In order to justify its decision the Appeals Court ignored and misinterpreted plaintiff's evidence on these points. On the question of proximate cause between plaintiff's injured arm and the second accident, here is plaintiff's testimony:

> "* * * so I got the stepladder and climbed to the top of it and got most of the windows down. I started to turn back off and fell into the wash basin, *due to the fact that I couldn't use my left arm.*" (A. 97)
>
> "I turned around to get my foot on the stepladder, and it moved. During the movement I fell. I couldn't get hold of nothing. *Left hand, I couldn't get it out to hold anything.*" (A. 181)

As to the defendant's second contention, the Appeals Court, for some strange reason, takes the position that the back injury sustained in the second accident was the event that rendered plaintiff unemployable and therefore "no reasonable juror would find that plaintiff's disability from work was solely attributable to his shoulder injury." (Opinion, P. 4) This position and statement in the Opinion does violence of the plain meaning of words in Dr. Davia's report. Under "Objective Findings" Dr. Davia observed that plaintiff was wearing a lumbosacral corset with metal stays. Nothing further is said in the report about the corset or plaintiff's back condition. No conclusion is made in the report nor can the slightest inference be raised from anything said in the report that plaintiff's back condition in any way contributed to his unemployability. There isn't a scintilla of evidence in the record showing that at the time of his back to work examinations plaintiff was in an way disabled from his back injury. Although Dr. Davia was employed by defendant, he was not produced

by defendant at the trial to testify about the contents of his report. Dr. Davia did say that plaintiff might "be able to do light sedentary work where use of the left arm was not fully required anytime." This was the physical disability that rendered plaintiff unemployable and for which plaintiff was discharged. No reasonable jury could have found otherwise. Yet the Appeals Court chose to brand the jury as unreasonable in deciding this important issue of fact in plaintiff's favor and chose to substitute its erroneous interpretation of the evidence for that of the jury.

Comments on Reason No. 2 for Reversal:

In attempting to justify its holding that plaintiff's verdict was "grossly excessive," the Opinion states (pp. 4-5) that "both parties agree that plaintiff's loss of earnings for the period of time he was unable to work *due to his shoulder injury* and his doctor and hospital expenses totaled $3,555.95." The Opinion then deducts this amount from the $125,000.00 and concludes that $121,444.05 is attributable to pain and suffering. Plaintiff agreed to no such thing. Plaintiff's position throughout all phases of this litigation has been that his unemployability was directly attributable to his shoulder injury. This is amply supported by the record. The Opinion's strange semantics and stranger mathematics are not justified by the evidence. At page 51 of plaintiff's Brief in the Appeals Court below plaintiff made the following analysis of the jury verdict:

Loss of earnings: January 31, 1962 to August 21, 1962, (six months, three weeks @ $91.40)	2467.80
Fired by defendant on June 21, 1963—off work from that date to time of trial (seven months three weeks @ $91.40)	2833.40
Presbyterian-St. Luke's Hospital bill	813.15
Dr. Heck	$200.00
Dr. Baldwin	60.00
Total losses up to time of trial	6379.35
Future loss of earnings—based on working expectancy of fifteen years to age 65 (Plaintiff's life expectancy was 31.5 years) at $91.40 per week or $4752.80 per year. This excludes promotions or wage increases which would offset a present cash value reduction of this sum	71292.00
	77671.35
Allowance for pain and suffering	47328.65
	$125000.00

To justify the Appeals Court's analysis of the verdict breakdown it would be necessary to reject the plain meaning of Dr. Davia's report, reject plaintiff's testimony and reject all of the medical evidence pertaining to plaintiff's shoulder disability.

Comments on Reason No. 3 for Reversal:

Plaintiff testified that the box he was carrying on his left shoulder was struck by the door slamming hard due to the defective door closer. The jury, who heard plaintiff testify and observed his demeanor on the stand, believed

him. The Appeals Court did not and chose to reject plaintiff's testimony and hold that plaintiff's shoulder injury "was not caused by the alleged defective door." (Opinion P. 8) In so holding, it was necessary for the Appeals Court to reject all of the corroborating evidence in the record supporting plaintiff's testimony of the accident.

As stated in the Opinion (P. 2), plaintiff testified that when he kicked the door back, he didn't get through fast enough and the door struck the box with such force that it almost knocked him to the floor. He felt a sharp pain in the left shoulder, put the box on the floor after taking two or three steps and rubbed his arm for a few seconds. He then *tried to lift the box, lifted it two or three inches off the floor and dropped it because of the pain.* Machtemes testified that plaintiff told him that as he *picked one* (a carton) *up from the floor,* he felt the pain in his shoulder. The accident report stated that while "*lifting a carton from the floor*" he felt a sudden pain in his left shoulder. Dr. Garrick's report showed that plaintiff told him that he "felt pain and 'catch' in left shoulder *while lifting 100 pound crate*, and stacking crates in piles." Dr. Hamilton testified that plaintiff told that "on one particular occasion when he was *lifting a box* he had a little more pain in shoulder than he had previously." St. Joseph Hospital: "left shoulder pain following injury to left shoulder while carrying office supplies in December 1961." (A. 364) St. Luke's Hospital: Patient claims onset ½ year ago when he traumatized (L) shoulder. (Additional A. 9)

All of this testimony corroborates plaintiff as to the last act he performed in the cycle of the accident, namely, lifting the carton from the floor. The only variance is whether plaintiff also told them about the defective door.

Plaintiff said he did. Defendant's witnesses say he did not. The jury, who saw and heard the witnesses believed the plaintiff.

Comments on Reason No. 4 for Reversal:

As a final reason for reversal, the Appeals Court chose to label this cause as "one of those exceptional cases which call for a reversal." (Opinion P. 9) The implication seems to be that once a case is labeled "exceptional" it can become subject to special appellate retaliation not permissable in other cases. This case revolved around the simple disputed questions of negligence and nature and extent of plaintiff's injuries. The jury resolved these questions in favor of plaintiff. There was nothing "exceptional" about this case that justified supervisory appellate control over the jury's factual findings.

The type of cases where supervisory control of a verdict may be imposed are those where the "integrity" of the judicial process is at stake. This control has been exercised where *newly discovered evidence after verdict* "casts the darkest shadow upon the truthfulness of the disclosure testimony." *United States* v. *Shotwell*, 335 U.S. 234, 240; *Mesarosh* v. *United States*, 352 U.S. 1. In the case at bar there was no newly discovered evidence that sullied the jury's verdict. There was no occasion here to apply the salutary principles set out in the *Shotwell* and *Mesarosh* cases. This "exceptional case" reason adopted by the Appeals Court was wholly unjustified by the evidence.

II.

Although the Appeals Court reversed and remanded for a new trial, the effect of the Opinion is to enter judgment for defendant notwithstanding plaintiff's verdict.

The Appeals Court's Opinion states that it does "not hold as a matter of law that plaintiff's injury was not caused by the swinging door." (Opinion P. 8) If it had respected this Court's admonition in *Lavender* v. *Kurn* and related cases directing Appeals Courts not to invade the jurys historic fact finding function, the Appeals Court should have affirmed. Instead the Opinion proceeds to excoriate plaintiff's credibility and attack the jury's competence. It resolved all evidence in favor of defendant in such uncompromising language as to make any future plaintiff's verdict unable to survive defendant's motion for a new trial. The Appeals Court, in its Opinion, held that it was left "with a grave doubt as to the truthfulness and reasonableness of his (plaintiff's) trial testimony," that "there was a miscarriage of justice in this case," and that the verdict returned by the jury was "arbitrary and capricious" and "in total disregard of the evidence." (Opinion, pp. 8-9) Implicit in these remarks is a complete rejection by the Appeals Court of the jury's evaluation of the evidence.

The Appeals Court was informed by petitioner in his Petition for Rehearing that the trial testimony in petitioner's case would be exactly the same at any future trial. No action on this information was taken by the Appeals Court. Thus, the Opinion, as it now stands, gives defendant the luxury of repeated trials until such time as it can persuade a jury to return a verdict of not guilty. Moreover, the Opinion, as it now stands compels plaintiff to play

Russian Roulette with his legal rights until such time as he presses the trigger on the bullet of "Not Guilty."

Under the circumstances, how far removed is the effect of the remandment for a new trial from an order giving defendant judgment notwithstanding plaintiff's verdict?

CONCLUSION.

We feel that the Appeals Court has erroneously weighed the evidence and substituted its opinion for that of the trier of the facts. We feel that this Opinion will cast a cloud upon the opinions of this Honorable Court protecting the fact finding powers of a jury in Federal Employer's Liability cases.

Wherefore, petitioner respectfully prays that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause, and for such other relief as to this Court may seem proper.

Respectfully submitted,

JOSEPH BARBERA,
One N. LaSalle Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

JOHN J. MILANO,
DOM J. RIZZI,
A. J. HARDIMAN,
Of Counsel.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964, JANUARY SESSION, 1965

No. 14660
BOB G. SHUPE,
Plaintiff-Appellee,

v.

NEW YORK CENTRAL SYSTEM,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JANUARY 4, 1965

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant New York Central System is appealing from a jury verdict and judgment for $125,000 in favor of plaintiff Bob G. Shupe resulting from injuries allegedly caused by defendant's negligence in an action brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51.

Plaintiff was employed by defendant as a janitor. His duties were to keep the locker rooms, offices and windows clean and to carry supplies from the first floor to the second floor of defendant's two-story office building. These supplies came in cardboard boxes weighing from 25 to 100 pounds.

Plaintiff's testimony at the trial concerning how the injuries for which he makes claim were sustained was as follows.

On December 19, 1961, he was engaged in carrying supplies for storage from the first floor to the second. He picked up a 100 pound cardboard box, put it on his left shoulder and carried it up the stairs to the second floor. At the top of the stairs was a landing and a door leading into a ladies' locker room where the boxes were to be stored. At the top of the door was a closing device which caused the door to close after it had been opened.

Plaintiff testified he opened the door with his right hand far enough so that he could get his left foot ahead of the door and kick the door back. He stated, "When I kicked the door back, I didn't get through fast enough. The door struck the box, almost knocked me to the floor, it was with such force." He felt a sharp tearing-like pain in his left shoulder and put the box on the floor after taking two or three steps. He stood, rubbed his arm a few seconds, reached down and tried to lift the box. He lifted it two or three inches off the floor and then dropped it because of the pain.

He testified he reported the accident to Andrew Machtemes, his gang foreman. He said that for about fifteen to twenty weeks before the date of this injury the door had been slamming and he had reported its condition four or five times to Joseph Walsh, assistant general foreman, and Raymond Preski, general foreman.

The primary issues to be decided on this appeal are whether the district court abused its discretion in denying defendant's motion for new trial on the grounds that the $125,000 verdict was grossly excessive and that there was not substantial evidence to support the jury's finding, by its general verdict, that plaintiff's injury was caused by the slamming door.

I.

As a result of plaintiff's injuries he did not work from January 31, 1962 to August 20, 1962. During this period plaintiff was hospitalized on four different occasions for a total of fifty-three days. He received various treatments and medications and on June 4, 1962 an operation was performed which removed 5/8ths of an inch of the distal end of his collar bone.

Both parties agree that plaintiff's loss of earnings for this period was $2467.80 and his hospital and doctor expenses totaled $1088.15.

Plaintiff was given a back-to-work examination on August 16, 1962 and two doctors wrote letters stating he could return to work He returned on August 21 and worked for ten months until June 21, 1963. On this date, he fell from a stepladder while washing windows in the course of his employment and injured his back. Plaintiff is not seeking to recover damages from defendant for this second injury.

On July 29, 1963, plaintiff presented himself to Dr. Hamilton for a back-to-work examination. Dr. Hamilton sent him to Dr. Davia who reported that plaintiff should be disqualified from working because of a limitation of motion and pain in his shoulder and the fact he was wearing a back brace. Dr. Hamilton concurred in the disqualification. He testified this examination disclosed the range of motion in plaintiff's arm to be between fifteen to thirty degrees of abduction, which was a marked decrease from that shown in plaintiff's back-to-work examination of August 16, 1962.

The principal point of disagreement between plaintiff and defendant on the issue of damages is whether plaintiff should be compensated for future loss of earnings. Plaintiff states that $71,292 of the $125,000 jury verdict represents plaintiff's future loss of earnings.[1]

Defendant contends that, "as a matter of law, the second accident was an intervening cause; that there is no evidence that the second accident was caused, in whole or in part, from the first; that as a matter of law it is not liable for the damages therefrom, particularly loss of future wages, the undisputed evidence being that it was the second accident that rendered plaintiff—at the time of the back-to-work examination—no longer employable as a janitor."

Plaintiff cannot recover damages which are not proximately caused by defendant's alleged negligence. *E.g.*, *S.S. Kresge Co.* v. *Kennedy, D.C. Cir.*, 86 F. 2d 651 (1936).

---

[1] This amount was said to be based upon a working expectancy of fifteen years to age sixty-five and plaintiff's last weekly salary of $91.40.

Plaintiff makes no claim that his fall from the stepladder and resulting back injuries were caused by any negligence of defendant. Plaintiff's position is that the doctors' disqualifications after his back-to-work examination were based upon his first injury.

Dr. Hamilton testified plaintiff was disqualified from work because of the findings by Dr. Davia that plaintiff "had a limitation of motion in his shoulder, and he was complaining about pain in his shoulder and * * * he was wearing a support to his back."

Dr. Davia's report to the United States Railroad Retirement Board stated, *inter alia*:

> "2. Present Disabling Condition: Marked limitation of motion of left arm at shoulder, symptomatic osteoarthritis of lumbar spine.
>
> "3. Objective Findings: * * * Information is especially needed about: Wearing lumbrosacral corset with metal stays. Motion almost completely restricted of left arm at shoulder. Tenderness and surgical scar over left acromioclavicular joint area. Had distal end of the clavicle removed.
>
> "6. Recovery Date: Give approximate date on which you believe claimant will be able to work (a) In his last occupation: Probably may never be able to return because of emotional problems or (b) other type of work: May be able to do light sedentary work where use of left arm is not fully required anytime."

In view of these findings and report and the fact that plaintiff worked continuously for ten months after his shoulder injury and immediately prior to his back injury, we hold that no reasonable juror would find that plaintiff's disability from work was solely attributable to his shoulder injury.

Plaintiff has the burden of proving what proportion, if any, of the alleged loss of future earnings was caused by the shoulder injury. See Prosser, Law of Torts, § 45, p. 229 (2d ed. 1955). No such proof was tendered.

As stated, *supra*, both parties agree that plaintiff's loss of earnings for the period of time he was unable to

work due to his shoulder injury and his doctor and hospital expenses for this injury totaled $3555.95. Subtracting this figure from the jury verdict leaves $121,444.05 attributable to pain and suffering, possible reduction of earning power and possible loss of future earnings. In the absence of proof concerning loss of future earnings attributable to the shoulder injury, most of this amount would have to be designated as damages for pain and suffering. We hold this amount to be grossly excessive. See *Thomas* v. *United States of America,* 7 Cir., 327 F. 2d 379, fn. 7 (1964) and *Goertz* v. *Chicago & N.W. Ry. Co.,* 19 Ill. App. 2d 261, 274-277, 153 N.E. 2d 486, 494 (1958).

II.

Defendant's second contention is that a new trial is required because the evidence overwhelmingly demonstrates plaintiff's shoulder injury was caused by his lifting a carton or box from the floor and not by the alleged defective door. Plaintiff's testimony as to how the accident occurred was set out previously. In addition to plaintiff's testimony, evidence concerning the cause of the shoulder injury is as follows.

Plaintiff testified he had reported to the general foreman and assistant general foreman of defendant, four or five times prior to his shoulder injury, that the door was defective. This was denied at the trial by both foremen.

Machtemes, a gang foreman, was called as a witness for plaintiff. He testified that on the day of plaintiff's injury plaintiff reported the accident to him and he filled out an accident report. Machtemes testified on cross-examination as follows:

> "Q. Mr. Machtemes, what did Mr. Shupe tell you happened on the morning of December 19, 1961?
>
> "A. He said he was up in the file room stacking cartons and that he picked one up from the floor, and as he turned to put it on the shelf, he felt the pain in his shoulder.
>
> "Q. Did he at any time mention to you a door striking him?
>
> "A. No, sir."

The accident report, which was introduced into evidence by plaintiff, stated, "Cause of accident as claimed: While stacking cartons of office material in file room and lifting a carton from floor felt a sudden pain in left shoulder."

Subsequent to the accident, plaintiff was treated for his shoulder injury by Dr. Garrick and Dr. Hamilton. He was admitted to St. Joseph's Hospital and St. Luke's Presbyterian Hospital for treatment. Plaintiff testified on cross-examination he told the doctors and personnel at the hospital about the door. Dr. Garrick testified there was nothing in the history taken from plaintiff concerning plaintiff's shoulder about being struck by a door. Dr. Hamilton testified that when he X-rayed plaintiff, plaintiff did not mention being struck by a door. The hospital records of plaintiff's history concerning the shoulder injury do not mention the door.

Dr. Garrick made out a "Surgeon's Report of Personal Injury" on plaintiff which was introduced into evidence by plaintiff. This report contained the following, *inter alia*: "1. Show cause of accident as stated by injured person—Felt pain and 'catch' in left shoulder while lifting 100# crate, and stacking crates in piles."

Dr. Hamilton testified plaintiff told him he injured his shoulder as follows: "He [plaintiff] also informed me that it was part of his duty to carry supplies from a down-stairs storage area up to the first floor, I believe, and he had to walk up some stairs, and he had felt pain in his shoulder occasionally, but he said on one particular occasion when he was lifting a box he had a little more pain in his shoulder than he had previously."

St. Joseph's Hospital report from Dr. Vanderbosch, on plaintiff's third admission, states under the title "History from patient," that plaintiff "• • • has excruciating pain in left shoulder since last December when he carried some boxes and 'strained' himself."

On June 7, 1962, an investigator employed by defendant wrote down the following statement allegedly told to him by plaintiff:

> "On 12-19-61, while working for New York Central, carrying boxes of stationary, time cards, etc., from

the main floor to the second floor of the main office bldg. at 33 West Root Street, Chicago, I injured my left shoulder. This injury occurred after carrying these boxes for about two hours. These boxes, some weighing more than 100 lbs., were carried on my left shoulder up two flights of stairs through a swinging door. My shoulder became sore gradually, like anyone's would, and finally after one trip I fell to my knees & dropped the box that I was carrying & experienced a severe pain, a sharp pain in my left shoulder. * * * I don't know if I trip or if the swing door knocked me down. * * *"

This statement was admitted into evidence. On cross-examination, plaintiff denied making the statement but testified the signature on it looked like his.

On August 16, 1962, the claim agent for defendant, accompanied by Bernard Lake, a court reporter, questioned plaintiff. Lake wrote down the questions asked by the agent and answers given by plaintiff. At the trial, he was called as a witness by defendant and read from his notes taken that day. He testified plaintiff was asked if he was injured while at work and he answered, "Yes, in moving cards, boxes, and things from the first floor of the building up on the second floor, stacking them, and I injured the bone on top of my left shoulder." When asked how many boxes he had carried he said, "Approximately twenty of them, carrying them all morning. I got the last box up there, and started to stock it up. I stacked them about, I imagine, about 4 or 5 foot high, caught a pain in my left shoulder." He was asked whether any particular box caused this pain or if it was the result of an accumulation of the work. He answered, "It must have been just the accumulation. I wouldn't say now, but I didn't get the sharp pain or nothing until I went to stack them up there, and I started to get one of those heavy boxes." On cross-examination, plaintiff denied being asked these questions and giving the answers.

Lake further testified plaintiff was asked whether he fell down when he injured his shoulder. He said plaintiff answered, "No. But I got hit a few times going through those swinging doors with those boxes, and I had about twenty boxes, I guess, together to stack up

some of them small ones, and some of them real heavy. And they had the real heavy swinging door, I don't know whether you were over there or not, but if you don't watch yourself, they knock you back the other way when they open."

On December 11, 1962, plaintiff applied for health and accident insurance with Continental Insurance Company. The application asked, *inter alia*, "Have you ever made claim for or received indemnity on account of any injury or illness? * * *" The answer on the application was, "Yes Travel Ins. Co. bursitis (1962) Recovered—Good Health Now." Plaintiff, on cross-examination, stated that the signature on the application was not his. When asked a second time whether he wrote the signature he replied, "I don't think so. I don't think I wrote that. It looks like my signature, but it don't correspond."

In sum, the record of the trial indicates there have been numerous instances where plaintiff has denied making a statement attributed to him and that his written name was his signature. The evidence, with the exception of plaintiff's testimony and statements allegedly made by plaintiff to others which referred to the door, indicates plaintiff's shoulder injury was not caused by the alleged defective door.

We do not hold as a matter of law that plaintiff's injury was not caused by the swinging door. However, plaintiff's claim at trial that he was injured by a defective door closer is so grossly at variance with that of the numerous persons with whom he came in contact after the alleged accident, we are left with a grave doubt as to the truthfulness and reasonableness of his trial testimony. We are fully cognizant of the limitations imposed on this court in determining matters of credibility on appeal. But, in reviewing the record as a whole, we are left with the firm conviction there was a miscarriage of justice in this case.

A jury may not properly return a capricious and arbitrary verdict in total disregard of the evidence. Under the circumstances of this case, giving regard to the gross excessiveness of the verdict, combined with close or doubtful liability, we are compelled to hold that the verdict

rendered was arbitrary and capricious and must be set aside. *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 191 F. 2d 302, 310 (1951).

While it is generally true that granting or denying a motion for new trial lies within the sound discretion of the trial court and ordinarily is not subject to review, we find this to be one of those exceptional cases which call for a reversal. *Bucher* v. *Krause*, 7 Cir., 200 F. 2d 576, 586 (1953), cert. denied, 345 U.S. 997; *Charles* v. *Norfolk & Western Ry. Co.*, 7 Cir., 188 F. 2d 691, 695 (1951).

This being an exceptional case, our holding is limited to the facts and circumstances we find decisive here.

We do not reach other claims of error raised by defendant in this appeal.

In light of our views hereinabove expressed, we hold that in the interest of justice a new trial is required. The judgment appealed from is reversed and this cause is remanded to this district court for a new trial.

REVERSED AND REMANDED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 14 1962
JOHN F. DAVIS, CLERK

No. 1071

In the

Supreme Court of the United States

October Term, A. D. 1961

[illegible],

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Richard O. Crowe
135 West Van Buren Street
Chicago, Illinois

Gunnar B. Carnegie
Edward J. Wagner
35 South Dearborn Street
Chicago, Illinois 60603
Attorneys for Respondent

Wagner, Stearns, Sayre & Patterson,
Of Counsel

The Schaffer Press, Inc.—Affidavit 2-4200

INDEX

PAGE

Questions Presented 1

Statement 2

Statement On Damages 7

Reasons For Denial Of The Writ 10

I. The Court Of Appeals Not Only Has The Power But The Duty To Order A New Trial In A Federal Employers' Liability Act Case, Where, After Reviewing The Whole Record, It Has A Firm Conviction That The Verdict Was Based Upon Perjury 10

II. The Damages Awarded Are Grossly Excessive 17

LIST OF AUTHORITIES.

Cases:

Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350, 353 (C.A. 4) 14

Affolder v. N. Y. C. & St. L. R. Co., 339 U.S. 96, 101 22

American Smelting & Refining Co. v. Sutyak, 175 F. 2d 123, 128 (C.A. 10) 15

Armstrong v. Bergeron, 104 N.H. 85, 178 A. 2d 293 18

Ault v. Kuiper, 279 Mich. 1, 271 N.W. 530 18

Ballard v. Forbes, 208 F. 2d 883 21

Barrett v. T. P. & W. R.R. Co., 334 F. 2d 803 (C.A. 7) 10

Boyle v. Bond, 187 F. 2d 362, 363 22

Campbell v. Clark, 271 F. 2d 578, 581 (C.A. 10) .. 15

PAGE

Charles v. Norfolk & W. Ry. Co., 188 F. 2d 691 (C.A. 7), cert. den. 342 U.S. 839 15

Cheffey v. Pennsylvania R. Co., 79 F. Supp. 252 (D.C. Penn.) 15

C. & O. Ry. Co. v. Gainey, 241 U.S. 494 19

C. & O. Ry. Co. v. Kelly, 241 U.S. 485, 489 20

C. & N. W. Ry. Co. v. Jackson, 55 Ill. 492, 497 19

Cobb v. Lepisto, 6 F. 2d 128, 129 (C.A. 9) 15

Commercial Credit Corp. v. Pepper, 187 F. 2d 71, 75 (C.A. 5) 15

Complete Auto Transit v. Floyd, 249 F. 2d 396, cert. den. 356 U.S. 949 21

Croak v. Croak, 33 S.W. 2d 998 18

Dagnello v. Long Island R. Co., 289 F. 2d 797 21

Dessi v. Pennsylvania R. Co., 150 F. Supp. 703, 706, aff'd 251 F. 2d 149 (C.A. 3), cert. den. 256 U.S. 167 15

Florig v. Sears, Roebuck & Co., 388 Pa. 419, 130 A. 2d 445 18

Garrison v. United States, 62 F. 2d 41, 42 (C.A. 4) 14

Johnson v. St. Paul City Ry. Co., 67 Minn. 260, 69 N.W. 900 20

Keaton v. A. T. & S. F. R.R., 321 F. 2d 317 (C.A. 7) 10

Kolyer v. Westmoreland Coal Co., 149 Pa. Sup. 473, 27 A. 2d 272 18

Kramer v. C. M. St. P. & P. R. Co., 226 Wis. 118, 276 N.W. 113 20

Mesarosh v. United States, 352 U.S. 1 16

PAGE

Mihalchak v. American Dredging Company, 266 F. 2d 875, 878 (C.A. 3) 15

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 14

Newell v. Detroit T. & I. R. Co., 235 Mich. 687, 209 N.W. 813, 814 19

Newsum v. Pennsylvania R. Co., 97 F. Supp. 500 (D.C. N.Y.) 15

Palmer v. Security Trust Co., 242 Mich. 163, 218 N.W. 677 20

Penson v. Inland Empire Paper Co., 73 Wash. 338, 132 P. 39 20

Pettingill v. Fuller, 107 F. 2d 933, 936 (C.A. 2) .. 15

Rothwell v. Pennsylvania R. Co., 87 F. Supp. 706, 707 15

St. Louis S. W. R. Co. v. Kendall, 114 Ark. 224, 169 S.W. 822 20

Sebring Trucking Co. v. White, 187 F. 2d 486 22

Siebrand v. Gossnell, 234 F. 2d 81 22

Smith v. Welch, 189 F. 2d 832, Dist. of Col. 22

Solomon Dehydrating Co. v. Guyton, 294 F. 2d 439, cert. den. 368 U.S. 929 22

Sporna v. Kalina, 184 Minn. 89, 237 N.W. 841 18

S. S. Kresge Co. v. Kenney, 86 F. 2d 651 (App. D. of C.) 18

Stewart v. Gilmore, 323 F. 2d 389, 391 (C.A. 5) .. 15

Trowbridge v. Abrasive Co. of Philadelphia, 190 F. 2d 825 21

United States v. Shotwell, 355 U.S. 233, 234 16

Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 408 (C.A. 4) 15, 21

PAGE

Widder v. N. Y. C. & St. L. R. Co., 142 F. Supp. 830, 835 (D.C. Pa.), aff'd 235 F. 2d 752 (C.A. 3) 15

Wineberg v. Borough of Du Bois, 209 Pa. 430, 58 Atl. 807 18

Texts:

Moore's Federal Practice, Vol. 6, p. 3817 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1964.

No. 1071

BOB G. SHUPE,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTIONS PRESENTED.

The questions presented by the record are not those stated in the petition.

The Court of Appeals reversed and remanded for a new trial because:

1. The verdict was grossly excessive; and

2. It was "left with the firm conviction there was a miscarriage of justice" because plaintiff's claim at the trial that he was injured by a defective door closer "was so grossly at variance with that of numerous persons with whom he came in contact after the alleged accident."

Therefore, the actual questions posed by the record are:

1. Does a Court of Appeals in a Federal Employers' Liability Act case have the power and duty to order a new trial when it has a firm conviction that the verdict rests solely upon perjured testimony?

2. Whether under the facts of this record the verdict was so grossly excessive as to require a new trial before another jury.

Since the petition fails to set forth the evidence in the record that impelled the Court of Appeals to come to its conclusions, substantial further statement is necessary.

STATEMENT.

On December 19, 1961, petitioner was working in respondent's one-story building at 33 West Root Street, Chicago. Office supplies were kept on the second floor (A. 41). Petitioner's duties included taking them up to the supply room and taking them back down as they were needed by the clerical help (A. 42).

He testified that on the day in question he picked up a 100 lb. cardboard box, put it on his left shoulder, and went up the stairs to the second floor. At the top of the landing was a door leading into the ladies' locker room (A. 45). This door has a device that causes it to close after being opened (A. 44). He claimed that he pulled the door back far enough to get his left foot ahead of it and then he kicked it back. Then, in his words, "When I kicked the door back, I didn't get through fast enough. The door struck the box, almost knocked me to the floor, it was with such force" (A. 48). He claimed he felt a sharp pain in his left shoulder and he put the box down. Afterward he went down and

allegedly reported the incident to Andrew Machtemes (A. 48). Petitioner claimed that the door had been in the condition alleged for fifteen or twenty weeks (A. 49). He said he had reported it to Mr. Joe Walsh, assistant general foreman, and Mr. Raymond Preski, general foreman, about four or five times, the last time two or three weeks before the accident (A. 49, 50). Both Preski and Walsh denied that petitioner ever claimed that the door was defective (A. 188, 241).

As just noted, after the alleged accident petitioner told Machtemes about it (A. 48). Testifying as a witness for *petitioner,* Machtemes said he prepared an accident report on the basis of what petitioner told him, which was introduced into evidence as petitioner's Exhibit 7-A (A. 60). Machtemes testified that petitioner told him he was up in the file room stacking cartons and he picked one up from the floor, *and as he turned to put it on the shelf he felt pain in his left shoulder.* Petitioner never mentioned the door striking him (A. 38). Machtemes' testimony was corroborated by his accident report, which is in his own handwriting, and states: "*While stacking cartons of office material in file room and lifting a carton from floor felt a sudden pain in left shoulder.*" Location of the accident is described as "File room, 2d floor, main building, Root St., Chicago" (A. 366).

Leo Zvitkovits, a witness for petitioner, said he signed petitioner's Exhibit 7, a typewritten accident report prepared by Machtemes and identical to the handwritten one (A. 366).

Petitioner went to see respondent's doctor, Dr. Samuel Garrick, on the same day. Petitioner testified that when he saw Dr. Garrick he told him about the door (A. 98).

Contrariwise, Dr. Garrick, testifying as a *witness for petitioner*, swore that petitioner told him, "He felt pain and a catch in his shoulder while lifting one hundred pounds of crates and piling them in a stack" (A. 64). He stated specifically there was nothing in the history he took from petitioner about his being struck by a door (A. 69).

On the same day he made out a "Surgeon's Report of Personal Injuries" that was introduced into evidence as *petitioner's* Exhibit 16 (A. 70). At the bottom of the form is a caption, "Statement of Injured Person." The doctor typed in, *"Felt pain and 'catch' in left shoulder while lifting 100# crate and stacking crates in piles"* (A. 367).

After treating petitioner for a few weeks Dr. Garrick sent him to another doctor, Eugene A. Hamilton, who saw him on January 9, 1962, some three weeks after the episode. Petitioner testified he gave Dr. Hamilton a history (A. 53), in which he told him about the door (A. 98).

The doctor denied this (A. 268) and said petitioner told him it was part of his duties to carry supplies and that he had to walk upstairs and he felt pain in his shoulder occasionally, but on one particular occasion when he lifted a box he had a little more pain in his shoulder than he had previously (A. 265).

The doctor found limitation of motion in petitioner's shoulder. Pursuant to his direction, petitioner was admitted to St. Joseph's Hospital on January 31, 1962. The official hospital record contains a history taken from petitioner by an intern named Lipovitch, which states in part: "Pt. is a janitor and carries heavy articles on his left shoulder. No past Hx trauma" (pet. Ex. 1; A. 364).

Thus, on admission nothing was said about the door or trauma of any sort.

After certain treatment petitioner was readmitted on May 4, 1962, and the history taken at this time makes no mention of a door being the cause of petitioner's difficulty (pet. Ex. 1, 2d Admission; A. 364). After subsequent treatment, it was decided that petitioner had to be hospitalized again because he might need psychiatric help. Petitioner was readmitted to the hospital on May 9, 1962. At that time he was interviewed by a psychiatrist by the name of Dr. Vanderbosch, whose report of the interview is part of the hospital record on the third admission. The "History from Patient" states that petitioner had had pain in the left shoulder" since last *December when he carried some boxes and 'strained himself'* " (A. 364). Again, there is no mention of a door.

Dr. Vanderbosch testified at the trial and confirmed his hospital entry (A. 204).

Petitioner testified that he was sent home from the hospital because Dr. Hamilton could find nothing wrong with his shoulder (A. 81). He then saw Dr. Baldwin, a family doctor, who transferred him to a Dr. Heck. The latter took a history on May 24. The doctor testified that petitioner said nothing to him about a door and the first time this was mentioned was when he examined petitioner on January 30, 1964, a few months before trial (A. 158). Neither the "Summary of the Case" prepared by a Dr. Yashon nor a "History Sheet" taken by an intern mentions any history of petitioner being hit by a door (A. 365, 366).

Dr. Heck made a diagnosis of acromioclavicular arthritis of the left shoulder (A. 135). He operated on

June 4, cutting through the skin on top of the shoulder and removing a 5/8-inch-long piece of the left distal clavicle and an interarticular disc (A. 139). His object in removing the bone was to eliminate contact between collarbone and shoulderblade. Dr. Heck testified that the condition he found could be described as "wear and tear" or "degenerative arthritis" (A. 140).

On June 7, 1962, an investigator took a statement from petitioner at Presbyterian-St. Luke's Hospital that was introduced into evidence as Defendant's Exhibits 3, 4, and 5 (A. 233). This statement, after reciting that he had been carrying boxes, states in part, "My shoulder became sore gradually, like anyone's would, and finally after one trip I fell to my knees & dropped the box that I was carrying & experienced a severe pain, a sharp pain in my left shoulder."

Petitioner denied making the above statement (A. 179). When asked whether his signature was on the document he said, "It looks like it is. I didn't say it was my signature. It looks like it" (A. 179).

On August 16, 1962, a court reporter took a statement from petitioner and testified that he said, "I injured my left shoulder. • • • Yes, in moving cards, boxes, and things from the first floor of the building upon the second floor, stacking them, and I injured the bone on top of my left shoulder. • • • I stacked them about, I imagine, about 4 or 5 foot high, and caught a pain in my left shoulder" (A. 230).

Petitioner denied making the above statements to the court reporter (A. 100, 101). In petitioner's statement of August 17, 1962, there was a reference to a swinging door, although no claim was made that the door closer was defective (A. 368). Apparently because of this refer-

ence to the claim department requested General Foreman Preski to inspect it in August, 1962, which he proceeded to do but found nothing wrong (A. 187).

STATEMENT ON DAMAGES.

As stated above, on petitioner's third admission to the hospital he had an operation on his left shoulder, the purpose of which was to relieve the arthritic pain caused by the collarbone and shoulderblade coming into contact. Petitioner was discharged on June 15. On July 19, 1962, Dr. Baldwin wrote the following letter to respondent:

> "Mr. Robert Shupe has been under my care and Dr. Charles Heck's care. He suffered from severe acromioclavicular arthritis. His problems have now been resolved and he may return to work." (Resp. Ex. 2; A. 367)

On July 23, 1962, petitioner went to Dr. Hamilton with the letter and requested a back to work examination (A. 291). Dr. Hamilton wrote a letter to Dr. Heck and the doctor wrote back saying that petitioner could raise his arm out to a full 90° and that he had external-internal rotation, that he ought to be allowed to go back to work, and that his range of motion would improve with work (A. 292). Dr. Hamilton performed an examination on August 16, 1962, and recommended that petitioner go back to work. Petitioner returned to work on August 21, 1962, and worked some ten months until June 21, 1963. Petitioner claimed that he had difficulty with his left arm (A. 84). However, there is not a bit of proof that any other employee took over any of the duties he had prior to the accident. He testified that he had to lift 100 lb. crates and take them to the second floor one to three times a week (A. 42). There is no evidence

that, in the ten month period following his return to work, anybody else carried these boxes to the second floor for him. Assistant General Foreman Walsh said that after petitioner returned to work in August, 1962, he did his job fully and that included carrying boxes from the first to the second floor (A. 241). Petitioner did not miss a single day of work until his second accident, referred to below.

The petition states that Dr. Hamilton testified that following his return to work petitioner's arm got worse (Pn. 5). This is not the fact. The record reference shows that the doctor was referring to the condition of petitioner's arm *after his second accident.*

Petitioner's employment was terminated after he had another accident on June 21, 1963. Petitioner was washing windows and fell off the stepladder when it moved (A. 181). According to him, "I busted my back" (A. 98). Petitioner came to Dr. Hamilton's office on July 29, 1963, for a back to work examination (A. 296). He was sent by Dr. Hamilton to a Dr. Davia. On August 21, 1963, he was advised in a letter that Dr. Davia had disqualified him as physically unfit to work. Dr. Hamilton testified that petitioner was disqualified from working because of limitation of motion in his shoulder and because he was wearing a support for his back (A. 297). He concurred in Dr. Davia's disqualification for these reasons (A. 312). At the time of the trial, February, 1964, petitioner was not under any medical care and had received no medical attention since 1962. He estimated that he had about 35% to 40% of normal movement in his left shoulder (A. 83).

Petitioner was earning $91.40 a week (A. 90). He was off from January 31, 1962, to August 20, 1962, with a

wage loss of $2,467.80. Hospital and medical expenses totaled about $1,090 (pet.'s Ex. 6, not printed; A. 146; A. 114).

The complaint herein was filed on October 8, 1962 (A. 2). It alleged, *inter alia*, that because of the defective door closer petitioner had lost, and would lose in the future, large sums of money because he was unable to follow his usual occupation (A. 5). The allegation, of course, was false because the complaint was filed about three weeks after petitioner had returned to work, and his employment was not terminated until June 21, 1963, and after his second accident.

During the trial petitioner's counsel explicitly disavowed attempting to recover damages for the second accident, saying, "We are making no claims for whatever injury he had on that fall which was an injury to his lower back" (A. 87).

REASONS FOR DENIAL OF THE WRIT.

I.

The Court Of Appeals Not Only Has The Power But The Duty To Order A New Trial In A Federal Employers' Liability Act Case, Where, After Reviewing The Whole Record, It Has A Firm Conviction That The Verdict Was Based Upon Perjury.

Petitioner, in listing the alleged questions presented, states, "Can a court of appeals overrule decisions of the Supreme Court?" (Pn. 2). The answer to such a question is obvious; it is equally obvious that no such question is presented by the decision of the Court of Appeals in this case.

The Court of Appeals for the Seventh Circuit was well aware in this case, as it has been in other cases (*Barrett* v. *T.P.&W. R.R. Co.*, 334 F. 2d 803 (C.A. 7); *Keaton* v. *A.T.&S.F. R.R.*, 321 F. 2d 317 (C.A. 7)), of the decisions of this Court relied upon by petitioner. These decisions are concerned with the power of a court to declare, as a matter of law, that the plaintiff has no cause of action. The direction of a verdict, as a matter of law, substitutes the determination of a Court on questions of fact for a jury. The granting of a new trial, on the other hand, merely requires that another jury determine the facts and the plaintiff is still in court. The Court of Appeals stated explicitly, "We do not hold as a matter of law that plaintiff's injury was not caused by the swinging door" (p. 8). However, it was firmly convinced from a review of the whole record that plaintiff's claim of a defective door closer was nothing but a fabrication and remanded the case for determination by another jury.

Before examining more closely the difference between a motion for a new trial and a motion for a directed

verdict, we briefly review the factual bases for the Court of Appeals holding.

At the trial petitioner claimed that he kicked the door back but was unable to get through before the door hit the box on his shoulder because it closed with such speed that he was knocked to the floor (A. 48). He claimed he reported the alleged condition to foremen Walsh and Preski several times before the accident.

Petitioner's trial version of the accident could be true only if the following propositions were also true:

1. Machtemes, *a witness for petitioner,* committed perjury when he testified that petitioner never mentioned the door striking him (A. 39), as petitioner testified at the trial (A. 48).

2. Machtemes made out a false accident report when he wrote that petitioner told him he felt a pain in his shoulder while stacking cartons of office material in the file room (A. 366).

3. Dr. Garrick, *a witness for petitioner,* committed perjury when he testified that petitioner did not tell him about being struck by a door (A. 69), as petitioner claimed at the trial (A. 98).

4. Dr. Garrick made out a false accident report when he stated the cause of the accident, "as stated by injured person," was that petitioner felt pain in the left shoulder while stacking crates (A. 367).

5. Dr. Hamilton committed perjury when he testified that petitioner never said anything about being hit by a door (A. 268), as petitioner claimed at the trial (A. 98).

6. The intern who took petitioner's history on his first admission to the hospital made a false record when he wrote down, "No past Hx trauma" (Pet. Ex. 1; A.

364), since petitioner claimed that he told the admitting doctor about the door (A. 98).

7. Dr. Vanderbosch committed perjury when he testified that petitioner told him that he "strained himself" when he carried some boxes (A. 204).

8. Dr. Vanderbosch wrote a false history when he wrote in the hospital record that petitioner had had pain "in left shoulder since last December when he carried some boxes and 'strained himself'" (A. 364).

9. Dr. Heck, *a witness for petitioner*, committed perjury when he testified that petitioner said nothing to him about a door and that the first time petitioner mentioned it was a few months before trial (A. 158).

10. The intern who took the history at the time of petitioner's admission to St. Luke's Hospital wrote a false history since he mentioned nothing about a door (A. 366), although petitioner testified that when he was admitted he told them about the door (A. 98).

11. The investigator who took a statement from petitioner at St. Luke's Hospital on June 7 wrote a false one since petitioner denied making it (A. 178), which petitioner signed, and which stated, "After one trip I fell to my knees and dropped the box I was carrying and experienced a severe pain, a sharp pain in my left shoulder" (A. 368).

12. The court reporter who testified that petitioner told him he injured his shoulder while stacking boxes (A. 230) committed perjury at the trial since petitioner denied making these statements (A. 100).

13. Foreman Walsh committed perjury when he denied petitioner ever claimed to him that the door was defective (A. 241), as petitioner testified.

14. Foreman Preski committed perjury at the trial when he denied that petitioner had ever complained to him that the door was defective (A. 188), as petitioner testified (A. 49).

15. Foreman Preski committed perjury when he testified that he inspected the door in August, 1962, and found nothing wrong with it (A. 186), since, if the door closer was defective in December, 1961, it would not have rectified itself in the intervening months.

It is beyond the realm of possibility that all or any substantial number of the above propositions could be true. Petitioner's claim was that everyone either lied at the trial or made out a false business record when they recorded or testified what petitioner told them concerning the cause of his shoulder difficulty.

No court lightly sets aside a verdict in an F.E.L.A. case. The opinion of the Court of Appeals was written by Chief Judge Hastings, certainly a most conscientious and able judge. But petitioner's raw, unadulterated, perjury was just too much for him and the other members of the panel to permit to be handsomely rewarded. Although the Court's opinion does not state in so many words that petitioner was guilty of manifest perjury, there is no mistaking that it was of this view. Being "left with a grave doubt as to the truthfulness" of petitioner's trial testimony and "giving regard to the gross excessiveness of the verdict," it held that the case should be remanded for a new trial.

The petition proceeds upon the false assumption that the Court of Appeals held, as a matter of law, that petitioner cannot recover. It did no such thing. There is a well recognized distinction between granting a new trial and turning a plaintiff out of court as a matter of law.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251, the Court said:

> "The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the Court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

In *Garrison* v. *United States*, 62 F. 2d 41, 42 (C.A. 4), the Court said:

> "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence, where in his opinion, it is contrary to the clear weight of the evidence, or is based on evidence which is false; for, even though the evidence is sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice * * *."

In *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350, 353 (C.A. 4), the Court said:

> "The exercise of this power [to grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Federal Employers' Liability Act cases are not different from any other class of cases in regard to whether a new trial should be granted when the Court is convinced that the verdict is based on false evidence. Trial courts have granted motions in F.E.L.A. cases where the verdict has been against the weight of the evidence or recognized their power and duty to do so. *Newsum* v. *Pennsylvania R. Co.*, 97 F. Supp. 500 (D.C. N.Y.); *Cheffey* v. *Pennsylvania R. Co.*, 79 F. Supp. 252 (D.C. Penn.); *Dessi* v. *Pennsylvania R. Co.*, 150 F. Supp. 703, 706, aff'd 251 F. 2d 149 (C.A. 3), *cert. den.* 256 U.S. 167; *Widder* v. *N.Y. C. & St. L. R. Co.*, 142 F. Supp. 830, 835 (D.C. Pa.), aff'd 235 F. 2d 752 (C.A. 3); *Rothwell* v. *Pennsylvania R. Co.*, 87 F. Supp. 706, 707.

Although it is sometimes said that a motion for a new trial is addressed to the District Court's discretion, the Courts of Appeal have held or recognized that they have the power and duty to reverse where there has been an abuse of discretion. *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 408 (C.A. 4); *Pettingill* v. *Fuller*, 107 F. 2d 933, 936 (C.A. 2); *Charles* v. *Norfolk & W. Ry. Co.*, 188 F. 2d 691 (C.A. 7), *cert. den.* 342 U.S. 839; *Cobb* v. *Lepisto*, 6 F. 2d 128, 129 (C.A. 9); *Commercial Credit Corp.* v. *Pepper*, 187 F. 2d 71, 75 (C.A. 5); *Campbell* v. *Clark*, 271 F. 2d 578, 581 (C.A. 10); *American Smelting & Refining Co.* v. *Sutyak*, 175 F. 2d 123, 128 (C.A. 10); *Mihalchak* v. *American Dredging Company*, 266 F. 2d 875, 878 (C.A. 3); *Stewart* v. *Gilmore*, 323 F. 2d 389, 391 (C.A. 5). See further, below, cases holding that a Court of Appeals may reverse for abuse of discretion in denying a new trial motion where the verdict is grossly excessive.

The foregoing principle being recognized, the question is whether F.E.L.A. cases are subject to any different

standard of review. We submit, there can be only one answer. The Courts owe it to themselves and to the people to stamp out fraud and perjury when it is manifest. Ultimate responsibility for permitting perjury for profit cannot be avoided by invoking the formula, "issue for the jury." The jury has a large, and almost exclusive, role in determining fact issues in this class of cases, as well as any common law cases, but every principle has its limits, and those limits are necessarily exceeded when a reviewing court is firmly convinced that a verdict rests upon perjury. No system of justice worthy of the name can countenance, either openly or covertly, fraud and perjury in the procurement of successful jury verdicts. In other contexts this Court has expressed concern over the "integrity" of trials in Federal courts and the use of perjury therein. *United States* v. *Shotwell*, 355 U.S. 233, 234; *Mesarosh* v. *United States*, 352 U.S. 1. That concern can be no less in an F.E.L.A. case.

Petitioner has not been put out of court as a matter of law. He still has the opportunity to try to convince another jury. Counsel says that respondent has been given the luxury of repeated trials until such time as a jury returns a verdict for it (Pet. 16). The Court of Appeals has made no such holding. Moore's *Federal Practice*, Vol. 6, p. 3817, points out that "limitless" grants of a new trial on the grounds that the verdict is against the weight of the evidence would violate the constitutional right of trial by jury. It will be time enough to determine how many new trials can properly be granted if that issue should ever arise; it does not arise here.

II.

The Damages Awarded Are Grossly Excessive.

The Court of Appeals held that the verdict was grossly excessive because, subtracting loss of earnings until the second accident, and medical and hospital expenses, from the $125,000 verdict, there was left $121,444.05, most of which had to be ascribed to pain and suffering (Op. p. 5). There is no evidence that petitioner is suffering from any significant pain in his "frozen" shoulder.

Page 13 of the petition has a "damage table" which purports to show that the allowance for pain and suffering was only $47,328.64 (Pet. p. 13). This figure is based upon the assumption that petitioner was rendered permanently and totally disabled from the first accident which is directly contrary to the actual fact.

Counsel states that "Plaintiff's position throughout all phases of this litigation has been that his unemployability was directly attributable to his shoulder injury. This is amply supported by the record" (Pet. p. 12).

The assertion is simply untrue. The complaint herein was filed on October 8, 1962 (A. 2), when petitioner was still working for respondent (A. 84). It alleged, falsely, that because of the accident petitioner was unable to follow his usual occupation (A. 5). Actually, petitioner was then following his usual occupation as janitor for respondent and continued to do so for eight and one half months thereafter and until his second accident (A. 84). With petitioner being steadily employed at the time suit was filed and for several months thereafter, it was not possible to allege that a then nonexistent "unemployability" was attributable to his shoulder injury. During the trial petitioner's counsel stated explicitly

that he was making no claims for damages suffered from the second accident (A. 87) and, in keeping with this theory, the damage instructions given to the jury on petitioner's behalf ignored it (A. 396, 397).

In short, petitioner contends that the Court of Appeals erred because it failed to take into account damages resulting from the second accident, notwithstanding this action was filed before it ever happened, no amendment was made to the pleadings to include it, and counsel expressly disavowed seeking any damages therefor. Even if petitioner had, by his pleadings, declared upon the second accident and alleged that it was causally related to the first, he could not have recovered The second accident did not occur until after petitioner had returned to work and worked continuously for ten months. On June 21, 1963, petitioner "busted" his back when a step-ladder moved, causing him to fall from it (A. 98). Under comparable circumstances many courts have held, as a matter of law, that there is no causal relation between the prior accident and a subsequent one even though a weakened condition resulting from the earlier accident played a part in the later one. *Ault* v. *Kuiper,* 279 Mich. 271 N.W. 530; *Sporna* v. *Kalina,* 184 Minn. 89, 237 N.W. 841; *Wineberg* v. *Borough of Du Bois,* 209 Pa. 430, 58 Atl. 807; *Croak* v. *Croak,* 33 S.W. 2d 998; *S. S. Kresge Co.* v. *Kenney,* 86 F. 2d 651 (App. D. of C.) *Florig* v. *Sears, Roebuck & Co.,* 388 Pa. 419, 130 A. 2d 445; *Armstrong* v. *Bergeron,* 104 N. H. 85, 178 A. 2d 293; *Kolyer* v. *Westmoreland Coal Co.,* 149 Pa. Sup. 473, 27 A. 2d 272. This issue, however, is not presented by the record in this case for the reasons just mentioned. Petitioner may or may not have a right to recover for damages resulting from his second accident in a new law suit but that right was never put in issue in this proceeding.

Since the Court of Appeals held that no reasonable juror would find that petitioner's disability from work was solely attributable to his shoulder injury it had no occasion to consider whether the verdict was grossly excessive, assuming that a jury could properly find that all of petitioner's damages resulted from the first accident. But we submit that, even if the second accident be ignored and all damages be held to have resulted from the first accident, the verdict would still be so grossly excessive that the District Court's denial of respondent's new trial motion would constitute an abuse of discretion.

At the time of trial petitioner said that he had about 35% or 40% movement in his left shoulder (A. 83). He has undergone no medical treatment since his operation. There is no medical or other testimony that petitioner is totally and permanently disabled from working. A man with 35% to 40% restriction of motion in one arm is not completely unemployable, although concededly his employment opportunities are more limited.

The first thing to be noted about the $125,000 verdict is that if it were put in investments at 5% it would give petitioner an income of $6250 a year for life and at his death the principal would not even be touched. Petitioner was earning $4,752.80 a year (A. 90). Consequently, the verdict would give him, without touching the principal, an income of $1500 a year more than when he was working for respondent. In holding verdicts to be grossly excessive, the courts have commented on the fact that the amount of the verdict, safely invested, would return the plaintiff more that he had been earning and still leave the principal intact, particularly where, as here, the injured person was not totally disabled. See, *e.g.*, *C.&O. Ry. Co.* v. *Gainey*, 241 U.S. 494; *Newell* v. *Detroit T. & I. R. Co.*, 235 Mich. 687, 209 N.W. 813, 814; *C. &*

N.W. Ry. Co. v. *Jackson*, 55 Ill. 492, 497; *Penson* v. *Inland Empire Paper Co.*, 73 Wash. 338, 132 P. 39; *St. Louis S.W. R. Co.* v. *Kendall*, 114 Ark. 224, 169 S.W. 822; *Johnson* v. *St. Paul City Ry. Co.*, 67 Minn. 260, 69 N.W. 900; *Palmer* v. *Security Trust Co.*, 242 Mich. 163, 218 N.W. 677; *Kramer* v. *C.M.St.P. & P. R. Co.*, 226 Wis. 118, 276 N.W. 113.

In his damage table petitioner's counsel shows that petitioner had a work expectancy of 15 years and there was a future loss of earnings of $71,292. Assuming for the moment that petitioner was totally and permanently disabled from working again by the first accident—which he was not—the figure is palpably erroneous. Under the law, damages for future loss of earnings must be reduced to the present cash value. *C&O. Ry. Co.* v. *Kelly*, 241 U.S. 485, 489. Reducing a sum of money to be earned in the future to its present cash value can be readily computed from tables that are as standard as multiplication tables. Taking a 5% discount rate—which can be easily obtained in safe investments at this time—loss of earnings for fifteen years in the future is $49,324; taking a 4% rate, $52,834. The table attempts to justify failure to reduce future earnings to present cash value on the theory that it excludes promotions and wage increases (Pet. p. 13). Prospects of promotion for a 45-year-old janitor are so remote as to be nonexistent. With respect to wage increases, it is customary in cases of this nature to put in proof of increases if there have been any between time of injury and time of trial. No such proof was put in in the present case.

Thus, taking counsel's own argument that petitioner had a work expectancy of fifteen years, this would leave approximately $75,000 for pain and suffering. This amount is so excessive as to shock the judicial conscience.

There is no medical testimony that plaintiff is presently suffering from pain—a standard item of proof in a case like this that can be made. It must be remembered that petitioner worked for ten months until the second accident, and if he suffers any pain at all from his "frozen" shoulder it cannot be much, because his own doctor wrote before he returned to work that his problems "have now been resolved and he may return to work" (A. 367). A man suffering any significant amount of pain is not sent back to work by his doctors.

In short, even if all of petitioner's damages can be based on the first accident, the amount allowed by the jury is still so grossly excessive that a denial of respondent's new trial motion would have constituted an abuse of discretion.

Perhaps a word should be said about the power of a court of appeals to review excessive verdicts. Petitioner does not challenge the existence of the power. He asserts, erroneously, the Court of Appeals made its ruling upon incorrect premises.

Until recent years virtually all, if not all, of the courts of appeal took the view that they had no power to set aside a verdict on the grounds of excessiveness or inadequacy; that this was a question addressed solely to the trial court; and if it approved the verdict there was nothing that the reviewing court could do. Today every circuit adheres to the rule that a reviewing court can review the excessiveness (or inadequacy) of a verdict. First: *Ballard* v. *Forbes*, 208 F. 2d 883. Second: *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797. Third: *Trowbridge* v. *Abrasive Co. of Philadelphia*, 190 F. 2d 825. Fourth: *Virginian Railway Co.* v. *Armentrout*, 166 F. 2d 400. Fifth: *Complete Auto Transit* v. *Floyd*, 249 F. 2d 396,

cert. den. 356 U.S. 949. Sixth: *Sebring Trucking Co.* v. *White,* 187 F. 2d 486. Eighth: *Solomon Dehydrating Co.* v. *Guyton,* 294 F. 2d 439, *cert. den.* 368 U.S. 929. Ninth: *Siebrand* v. *Gossnell,* 234 F. 2d 81. Tenth: *Smith* v. *Welch,* 189 F. 2d 832, Dist. of Col.; *Boyle* v. *Bond,* 187 F. 2d 362, 363. The most scholarly treatment of this point is undoubtedly contained in the opinion of the Court of Appeals for the Second Circuit in the *Dagnello* case.

So far as we are advised, this Court has never squarely held whether a Court of Appeals may set aside a verdict in an action for personal injuries upon the grounds of excessiveness. The implication of this Court's language in *Affolder* v. *N.Y., C. & St. L. R. Co.,* 339 U.S. 96, 101, is that a reviewing court may properly do so if it considers the verdict "monstrous." This case has been relied upon by some of the Courts of Appeal in holding that they may review the question of excessiveness.

Once the power to review for excessiveness be acknowledged, it is difficult to imagine a clearer case than this one calling for its exercise.

We submit, that this Court, upon a review of the entire record, must conclude, as did the Court of Appeals, that the gross excessiveness of the verdict, together with petitioner's patently perjurious testimony, require that a new trial be had in the interests of justice. The Court of Appeals said this was "an exceptional case." (Pet. p. 9). We are confident that this Court will reach the same conclusion and uphold the decision below.

The petition should be denied.

Respectfully submitted,

RICHARD O. OLSON
135 West Van Buren Street

GEORGE B. CHRISTENSEN
EDWARD J. WENDROW
38 South Dearborn Street
Chicago, Illinois 60603
Attorneys for Respondent.

WINSTON, STRAWN, SMITH
& PATTERSON
Of Counsel.